Apr 18, 2001 (22)

Supreme Court, U.S.
FILED
APR 18 2001
CLERK

No. 00-597

In the Supreme Court of the United States

ALTADIS U.S.A. INC., AS SUCCESSOR TO CONSOLIDATED CIGAR CORPORATION AND HAVATAMPA, INC.; GENERAL CIGAR CO., INC.; JOHN MIDDLETON, INC.; LANE LIMITED, AS SUCCESSOR TO TOBACCO EXPORTERS INTERNATIONAL (USA) LTD.; L.J. PERETTI CO., INC.; SWEDISH MATCH NORTH AMERICA, INC.; SWISHER INTERNATIONAL, INC.,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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18 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. THE ATTORNEY GENERAL HAS NOT IDENTIFIED ANY EVIDENCE THAT THE BAN ON CIGAR ADVERTISING WILL DIRECTLY AND MATERIALLY REDUCE YOUTH CIGAR SMOKING, AND THUS HAS FAILED TO CARRY HIS BURDEN UNDER THE THIRD PRONG OF *CENTRAL HUDSON* ... 2

II. THE ATTORNEY GENERAL HAS NOT IDENTIFIED ANY EVIDENCE THAT THE BAN ON OUTDOOR CIGAR ADVERTISING IS REASONABLY TAILORED TO SERVE THE COMMONWEALTH'S INTEREST, AND THUS HAS FAILED TO CARRY HIS BURDEN UNDER THE FOURTH PRONG OF *CENTRAL HUDSON* 10

CONCLUSION 14

TABLE OF AUTHORITIES

CASES **Page(s)**

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 13

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,
447 U.S. 557 (1980) ..... *passim*

Edenfield v. Fane,
507 U.S. 761 (1993) 8

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 3

Greater New Orleans Broadcasting Ass'n v. United States,
527 U.S. 173 (1999) 7

Linmark Assocs., Inc. v. Township of Willingboro,
431 U.S. 85 (1977) 12

Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 8

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 10

OTHER AUTHORITY

William Hamilton & Giulia Norton,
Independent Evaluation of the Massachusetts Tobacco Control Program,
Abt Assocs. Inc. (1999), *available at*
http://www.state.ma.us/dph/mtcp/report/abtrep.htm 12

Youth Tobacco Surveillance United States, 1998-99, CDC Surveillance Summaries,
Morbidity and Mortality Weekly Report,
Vol. 49 (Oct. 13, 2000) 4

This case (No. 00-597) is about the censorship of cigar advertising – not cigarette advertising. The Attorney General's consolidated opposition brief ("Resp. Br."), however, utterly ignores the total lack of evidence that *cigar* advertising affects youth *cigar* smoking; that the ban on outdoor *cigar* advertising will materially reduce youth use of *cigars*; or that the ban is narrowly tailored to address the alleged harm caused to children by *cigar* advertising.

The Attorney General seeks to mask this lack of evidence by using the generic term *tobacco* when describing the record evidence that relates to *cigarette* – but not *cigar* – advertising and its effects. He goes so far as to state, for example, that "the FDA's proposed rule would have prohibited all outdoor tobacco advertising within 1,000 feet of schools and playgrounds," Resp. Br. at 45 n.23, even though the FDA expressly *excluded* cigar advertising from its proposed ban. The FDA found no evidence to support the need for, or effectiveness of, a ban on outdoor cigar advertising. *See* Pet. Br. at 11.

Many of the briefs supporting the Attorney General (such as that of the United States) similarly hide the absence of any evidence of the effects of cigar advertising behind broad references to "tobacco." Several other amici, however, filed briefs in the cigarette case but not this case, indicating an awareness of the distinct issues in each appeal. The only amicus brief that directly addresses cigar advertising identifies no studies or other evidence showing the effect of cigar advertising on youth cigar use, or that the ban on outdoor cigar advertising would have any impact whatsoever on youth cigar smoking. *See* Brief of Tobacco Control Resource Center, Inc. ("TCRC Br."). Rather, like the Attorney General's brief that it supports, the TCRC Brief also persistently attributes to cigars study findings relating only to cigarettes. For example, the TCRC erroneously states that the Attorney General's storefront

study shows there are more cigar advertisements in areas close to schools than far away, thus supposedly proving that cigar manufacturers employ aggressive sale practices to lure minors with "expensive well-researched advertising campaigns." *Id.* at 16. In fact, that study shows that outdoor cigar advertisements were minuscule in number relative to all advertisements and cigarette advertisements – as the court of appeals noted, Pet. App. 31a – and indeed that there were more cigar advertisements in areas farther away from schools. *See* Pet. Br. at 10; *see also* C.A.J.A. 2424.[1]

ARGUMENT

I. THE ATTORNEY GENERAL HAS NOT IDENTIFIED ANY EVIDENCE THAT THE BAN ON CIGAR ADVERTISING WILL DIRECTLY AND MATERIALLY REDUCE YOUTH CIGAR SMOKING, AND THUS HAS FAILED TO CARRY HIS BURDEN UNDER THE THIRD PRONG OF *CENTRAL HUDSON*.

In their opening brief, Petitioners argued that the record is devoid of any evidence establishing that cigar advertisements contribute to youth cigar smoking, much less that banning outdoor cigar advertising would materially reduce youth cigar smoking. *See* Pet. Br. at 9-18. The Attorney General's response identifies no such

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[1] The Attorney General observes that his failure to challenge the truthfulness of cigar advertisements in his own motion for summary judgment would not preclude him from raising the challenge later if that judgment is reversed by this Court. Resp. Br. at 35 n.17. That is correct, but irrelevant, because the Attorney General's failure to challenge the truthfulness of cigar advertisements in opposition to Petitioners' motion for summary judgment has precisely that preclusive effect.

evidence. Instead, the Attorney General attempts to distract this Court from the complete and utter absence of any such evidence by describing evidence with the generic term "tobacco" rather than distinguishing cigars from cigarettes. For example,

- the Attorney General refers repeatedly to findings regarding "tobacco" advertising in the Surgeon General's reports, *see* Resp. Br. at 3, 4-5, 6-7, 39, 41, but fails to mention that the cited portions of the Surgeon General's reports deal with cigarettes, cigarette manufacturers and cigarette advertising, not cigars, *see* J.A. 187, C.A.J.A. 1206-07, 1218;[2]
- the Attorney General asserts that the CDC and the National Academy of Sciences have recommended regulation of "tobacco" advertising, Resp. Br. at 5, but in fact both the CDC and the National Academy of Sciences addressed only cigarettes, not cigars, J.A. 177, 211;
- the Attorney General quotes this Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000), as recognizing that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States," Resp. Br. at 3, even though that case involved the FDA's attempts to impose advertising bans on cigarettes and smokeless tobacco, not cigars;

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2 The brief submitted by the TCRC employs the same artifice, particularly in reference to the 2000 Surgeon General's report. The TCRC Brief asserts that the Surgeon General has concluded that "tobacco" advertising affects youth use, TCRC Br. at 9, and that the Surgeon General advocates a "comprehensive plan to prevent tobacco use by children," TCRC Br. at 10, without revealing that the Surgeon General's report relates to cigarettes, not cigars, *see* J.A. 187.

- the Attorney General relies on a study following the Master Settlement Agreement (the "MSA") to suggest that the density of "tobacco advertising" is particularly high near schools, Resp. Br. at 7, but fails to mention that the MSA and the study involved cigarettes, not cigars, and that his own Operation Storefront study shows that outdoor cigar advertising, nominal as it is, is even less prevalent near schools than away from schools, C.A.J.A. 2424;[3] and
- the Attorney General refers to "the sheer volume and repetition of tobacco advertising," Resp. Br. at 41, but, as the court of appeals acknowledged, "the advertising of cigars is nearly nonexistent in comparison with the pervasive promotion of cigarettes," Pet. App. 31a; *see also* C.A.J.A. 2424.

The TCRC Brief is also replete with misstatements of surveys regarding the extent of youth use of cigars.[4] In any event, the TCRC's reliance on such survey data completely misses the point: Petitioners have not contested in this appeal the substantial state interest in minimizing youth use of cigars. But the TCRC (and the Attorney General)

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3 The TCRC Brief repeatedly makes the same mistake. *See, e.g.*, TCRC Br. at 16, 19.

4 The TCRC, for example, claims that a report by the CDC – which appears nowhere in the record – indicates that 41% of high school students "tried cigar smoking" and 15.3% "regularly smoke cigars." TCRC Br. at 4 (citing *Youth Tobacco Surveillance United States, 1998-1999*, CDC Surveillance Summaries, Morbidity and Mortality Weekly Report, Vol. 49 (Oct. 13, 2000) (the "CDC Report")). In fact, the CDC Report indicated that 41.6% of high school students stated that they had tried at least one puff of a cigar once in their lifetime. *See* CDC Report at 46. Further, the study reported that only 0.7% of high school students stated they were "frequent" cigar users, as compared to 13.1% who reported they were frequent cigarette users. *See* CDC Report at 54.

identify no evidence on the issue in contention: whether outdoor cigar advertising appreciably affects youth cigar use.

The Attorney General cites only *one* piece of evidence that actually concerns cigars, referring to a statement in the Smoking and Tobacco Control Monograph No. 9 (the "NCI Monograph"). *See* Resp. Br. at 39 n.19.[5] But the Attorney General fails to acknowledge that the NCI Monograph does *not* report that cigar advertising (let alone the outdoor cigar advertising banned by the Attorney General) affects youth cigar use. Precisely to the contrary, rather than finding any evidence that cigar advertising causes youth smoking, the NCI Monograph concludes that there is a need for additional "[r]esearch to learn the extent to which advertising and promotion for cigars . . . reaches and affects kids." C.A.J.A. 2799. It recognizes that "[o]nly a small amount of conventional advertising appears for cigars." C.A.J.A. 2780. It does not report or suggest that outdoor cigar advertising has contributed to increased youth cigar smoking. Rather, it acknowledges that the dramatic increase in cigar acceptability and consumption coincided with the advent of *Cigar Aficionado* in 1992. *See* C.A.J.A.

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5 This excerpt from the NCI Monograph stating that cigars are being "heavily promoted in ways likely to influence adolescent use" is not evidence that cigar *advertisements* – let alone outdoor cigar advertisements – have had any effect on youth cigar consumption. Instead, the NCI Monograph was referring to the broad spectrum of cigar promotions in popular culture. *See* J.A. 239, 243; C.A.J.A. 2599-2600. Indeed, the NCI's assertion only highlights the irrationality of the Attorney General's attempt to ban the minuscule amount of outdoor cigar advertisements, which the Operation Storefront study shows are in no way targeted towards children, while allowing the much more prevalent *non*-advertising cigar exposures to remain. *See* Pet. Br. at 17; C.A.J.A. 2424.

2796. It notes the increase in cigar dining and entertainment, retail specialty tobacco shops, and cigar bars. *See* C.A.J.A. 2779, 2789. It also notes that "[t]he resurgence in popularity of cigars has been covered, *and in part fueled by*, articles in newspapers." C.A.J.A. 2791 (emphasis added). It thus finds that the cigar "promotional activities" that may have increased smoking "are not necessarily the result of activities by commercial interests." C.A.J.A. 2777.

The TCRC Brief attempts to gloss over the differences between cigarette and cigar advertising by comparing the relative percentages of the respective promotion budgets that cigar and cigarette manufacturers reportedly spent on point-of-sale advertisements. TCRC Br. at 7-8. But this comparison is entirely irrelevant. The amount of cigar advertisements and promotions is still utterly inconsequential relative to cigarettes, as recognized by the court of appeals, *see* Pet. App. 31a, the FTC, *see* C.A.J.A. 2544, 2874.04, and the FDA, *see* J.A. 227-28. Similarly, while the TCRC cites a study of 100 stores in Worcester for the proposition that 11% of tobacco advertising at retail stores is devoted to cigars, TCRC Br. at 7, 19-20, it fails to reveal the study's critical finding that "[t]obacco advertisements on the *outside* of stores are almost exclusively for cigarettes." C.A.J.A. 2478 (emphasis added).[6]

When the mask of generic "tobacco" is stripped from the Attorney General's brief, it becomes clear that the Attorney

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6 Despite the TCRC's assertion, *see* TCRC Br. at 17, the FTC consent decree does not contain any finding that cigar advertisements were deceptive or misleading; likewise, the FTC did not encourage the states to regulate cigar advertisements, *see* TCRC Br. at 8-9, but rather merely stated that such regulations would not be preempted.

General's argument reduces to an assertion that evidence regarding *cigarettes* should suffice to support his ban on *cigar* advertising. This is patently insufficient under the third prong of *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *See* Pet. Br. at 12-13, 16-17. This Court requires evidence that banning the *specific* type of advertising would further the State's interest. *See, e.g., Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 189 (1999). This is particularly true given the significant and profound differences established in the record between cigar and cigarette advertising. *See* Pet. Br. at 9-11. Here, the Attorney General has failed to identify any evidence that outdoor cigar advertising (or indeed any cigar advertising) contributes to youth cigar smoking or that the ban would materially reduce youth cigar use.

Perhaps finally recognizing that his proffered cigarette advertising evidence cannot support his cigar ban under *Central Hudson*, the Attorney General argues that it would be "irrationally inconsistent for Massachusetts to restrict cigarette advertising" and not to restrict cigar advertising. Resp. Br. at 40 n.21. But there is nothing at all irrational about such a policy if the evidence warrants that distinction. It is perfectly rational to distinguish between a speech ban that is shown to directly and materially advance a state interest and to be narrowly tailored versus one that is not. Indeed, that is precisely what the FDA concluded in deciding to regulate cigarette advertisements but *not* cigar advertisements, J.A. 227-28; what Congress did in requiring the Surgeon General to provide regular reports regarding cigarette smoking but *not* cigar smoking, J.A. 187; and what numerous amici (including the American Medical Association, the American Heart Association, the American Lung Association, and the American Cancer Society) did in supporting only the cigarette restrictions here but *not* the

cigar restrictions. And, most importantly, this type of distinction is exactly what *Central Hudson* requires: a State cannot ban truthful, non-misleading commercial speech unless it provides real evidence that banning the speech will directly and materially advance the State's interest and is narrowly tailored.

Lacking any such evidence, the Attorney General predictably makes a plea for deference to his "common sense." *See* Resp. Br. at 38, 40. But such a plea is patently insufficient even under intermediate scrutiny. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995) (holding that "anecdotal evidence and educated guesses" were not "convincing evidence that the labeling ban ha[d] inhibited [alcohol] strength wars" between beer advertisers). As this Court has held, the State's "burden [under *Central Hudson*] is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that Florida ban on in-person solicitation by CPAs is unconstitutional). While "common sense" arguably might suggest that advertising could have some effect on increasing overall consumption, as opposed to merely affecting choice among competing brands, this would hardly establish that banning cigar outdoor advertisements would have a direct and *material* effect on youth consumption as required under *Central Hudson*. Moreover, here "common sense" dictates the exact opposite, *i.e.* that banning outdoor cigar advertising would *not* materially decrease youth cigar consumption, given (i) the extremely low prevalence of cigar advertising; (ii) the fact that fewer outdoor cigar advertisements are located in areas near to as opposed to far from schools, as reported in the Attorney General's own

Operation Storefront study, *see* C.A.J.A. 2424; and (iii) the far greater prevalence of *non*-advertising images of cigars, as reported in the NCI Monograph, *see* C.A.J.A. 2777-80, 2789, 2791, 2797.

Because he has no evidence that the ban on cigar advertising will directly and materially advance the Commonwealth's interest in reducing youth smoking – the interest on which the court of appeals relied – the Attorney General now asserts as a new and separate "substantial interest[]" under *Central Hudson* his interest in supporting federal, state, and parental efforts to reduce youth smoking. Resp. Br. at 37. This adds nothing to his argument. There is no evidence that banning cigar advertising will materially advance federal, state or parental efforts to reduce youth cigar smoking, because there is no evidence that banning cigar advertising will materially reduce youth cigar smoking. A contrary holding would suggest that, whenever there is no evidence that a ban would materially advance the State's interest, the State can merely tweak the argument and allege that the ban would help parents or a governmental agency deal in some way with the issue, thus emasculating the First Amendment protections that the *Central Hudson* standard is intended to safeguard. To the extent that the Attorney General now seeks instead to define his interest as "limit[ing] . . . children's exposure to tobacco advertising," Resp. Br. at 37 – in order to escape the consequence of the absence of evidence that cigar advertising affects youth cigar smoking – this argument also fails from its own weight. Unlike obscenity, for which the receipt of the speech *itself* constitutes the harm, the asserted harm from cigar advertising lies entirely in its effects on the viewer's conduct and choices: cigar advertising can be banned only if the Attorney General establishes that such a ban would directly and materially

reduce youth cigar smoking.[7] Because the Attorney General has no evidence that the ban would accomplish that goal, the ban cannot survive intermediate scrutiny.

II. THE ATTORNEY GENERAL HAS NOT IDENTIFIED ANY EVIDENCE THAT THE BAN ON OUTDOOR CIGAR ADVERTISING IS REASONABLY TAILORED TO SERVE THE COMMONWEALTH'S INTEREST, AND THUS HAS FAILED TO CARRY HIS BURDEN UNDER THE FOURTH PRONG OF *CENTRAL HUDSON*.

In their opening Brief, Petitioners emphasized the lack of any evidence that the 1000-foot ban is appropriate for cigar advertising, particularly given that outdoor cigar

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[7] The Attorney General also makes no attempt to respond to the record evidence that cigar self-service displays serve as a critical means of communication between cigar manufacturers and consumers; *i.e.*, that these displays are a form of commercial speech. *See* Pet. Br. at 23 n.9. Cigar self-service displays are thus fundamentally unlike the drug paraphernalia banned in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), upon which the Attorney General exclusively relies, Resp. Br. at 47 n.26. *See* 455 U.S. at 497 n.8 (plaintiff there "did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers"). The TCRC's attempt to justify the ban on cigar self-service displays is similarly unavailing. The CDC Report demonstrates that theft is minimal and that the great bulk of youth access to cigars does not come from theft from self-service displays. *See* CDC Report at 6-7, 23, 70 (only 0.7% of high school student reported having stolen a cigar, i.e., 4.8% of the 15.3% of high school students who had reported using a cigar at least once in the month before the study obtained cigars by theft). The CDC Report does not even state that this minuscule amount of theft was from retail self-service displays. *See* CDC Report at 23, 70.

advertisements in Massachusetts are minuscule in number and not concentrated near schools. Pet. Br. at 20-23. The Attorney General offers no direct response. Instead, the Attorney General once again relies entirely on evidence relating to *cigarette* advertising. For example:

- the Attorney General points to the advertising restrictions agreed to in the Master Settlement Agreement, *see* Resp. Br. at 42 n.22, even though cigar advertising was not considered in, nor were cigar manufacturers parties to, the MSA;[8]
- the Attorney General relies repeatedly on the FDA report, inaccurately claiming that the "FDA's proposed rule would have prohibited all outdoor tobacco advertising within 1,000 feet of schools and playgrounds," Resp. Br. at 45 n.23, even though the FDA chose to *exclude* cigar advertising due to the differences between the marketing of cigars and cigarettes, and the lack of sufficient evidence to support a ban on outdoor cigar advertising, J.A. 227-28; and
- the Attorney General focuses on alternative means of communication supposedly available to large cigarette manufactures, such as advertising in "magazines, newspapers, direct mail or other media," Resp. Br. at 43, ignoring that the ban on cigar advertising will completely prevent local cigar *retailers* like Peretti from communicating with adults passing by, an audience that cannot be reached by magazine or

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8 That the cigarette manufacturers agreed to such restrictions in settlement of claims in no way indicates that even the MSA's restrictions on advertising of cigarettes, much less cigars, are narrowly tailored.

newspaper ads even if local retailers could afford them.

The Attorney General also fails to respond in any way to Petitioners' argument that, before resorting to an advertising ban, he should seek to accomplish his goals without censorship. For example, the Commonwealth has touted its targeted campaign of counter-speech to reduce youth cigarette smoking. *See, e.g.*, C.A.J.A. 673, 675-76. But, as Petitioners noted in their opening Brief and the Attorney General did not dispute, there is no evidence that the Commonwealth has used such counter-speech efforts to reduce youth *cigar* smoking with anything close to the same focus and intensity. *See, e.g., Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977) (suggesting that the state use counter-speech rather than speech restrictions to advance its interests). Indeed, there is no evidence that the Attorney General has used available enforcement mechanisms with equal effort against youth cigar smoking as against youth cigarette smoking. A key illustration of this is the 31,600 Massachusetts tobacco sting operations referenced in the TCRC Brief, TCRC Br. at 11, *all* of which involved cigarettes, not cigars. *See* William Hamilton & Giulia Norton, *Independent Evaluation of the Massachusetts Tobacco Control Program*, Abt Assocs. Inc. (1999), *available at* http://www.state.ma.us/dph/mtcp/report/abtrep.htm, at http://www.state.ma.us/dph/mtcp/report/abtrep2.htm p.11. Similarly, the Attorney General should have allowed time for the various new enforcement mechanisms, *see* Resp. Br. at 8, to take effect before resorting to banning speech. Having failed first to try these non-censorship alternatives, the Attorney General's ban on constitutionally-protected cigar advertisements violates the fundamental principle of law that a state may not "choose suppression over a less

speech-restrictive policy." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 509 (1996).[9]

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9 The Attorney General's half-hearted argument that the ban on cigar advertising could survive strict scrutiny, *see* Resp. Br. at 49-50, depends on a misguided reliance on cases involving obscenity, in which the viewing or hearing of offensive speech is itself the harm to be prevented. This reasoning is inapplicable here, where viewing the proscribed commercial advertising is not in itself harmful, but instead is sought to be banned for its effects on viewers' choices and conduct. In these circumstances, any supposedly negative effects can be combated with counter-speech.

CONCLUSION

In resisting the application of strict scrutiny, the Attorney General and his amici have argued that intermediate scrutiny under *Central Hudson* is sufficiently rigorous to protect the First Amendment concerns of commercial speakers. But if *Central Hudson* has any rigor at all, the Attorney General must provide real evidence to support his ban on constitutionally protected speech. He has failed in that, and the ban on cigar advertising should therefore be struck down as lacking any evidentiary basis. The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 18, 2001